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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 254.

OTIS & CO., *Appellant*,

v.

THE UNITED STATES OF AMERICA, THE PULLMAN COMPANY, PULLMAN-STANDARD CAR MANUFACTURING COMPANY, PULLMAN INCORPORATED, *et al.*

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR OTIS & CO., APPELLANT.

OPINIONS BELOW.

The opinion of the specially constituted district court (R. 726) is reported in 50 F. Supp. 123. The supplementary opinion sur form of judgment (R. 759) is reported in 53 F. Supp. 908. The opinion sur judgment (R. 774) is reported

in 55 F. Supp. 985. The opinion upon application for approval of sale of The Pullman Company (R. 1193) is reported in 64 F. Supp. 108.

JURISDICTION.

The final order and decree of the district court was entered on January 4, 1946, (R. 1203). Petition for appeal was presented and allowed on March 4, 1946 (R. 1215, 1216). The jurisdiction of this Court is invoked under Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 936, 938; 28 U. S. C. 345). Probable jurisdiction was noted by this Court on October 14, 1946 (R. 2639).

QUESTIONS PRESENTED.

The ultimate question is whether the decision and final order of the court approving the sale of The Pullman Company to a combination of railroads doing 95 per cent of the passenger-carrying business of the United States should be reversed. The above order was entered on January 4, 1946, in a suit instituted by the United States Government under Sections 1 and 2 of the Sherman Antitrust Act. The overall questions are whether the court below erred (a) in allowing Pullman Incorporated, adjudged guilty of violating the antitrust laws, to select its own successor, and (b) in approving sale to the railroad combine without appraising the several offers to purchase in terms of the ends the suit was designed to serve. These questions resolve themselves into three dominant issues:

1. Whether a combination of the principal railroads of the United States, many of which are in competition, may acquire control of the pool of sleeping cars and facilities now owned and operated by The Pullman Company and through such dominance over the entire supply in practical

effect eliminate all competition in the business of providing sleeping car service.

2. Whether a sale of The Pullman Company to the combination of railroads will effect a complete and permanent separation of the sleeping car business from the railroad, banking and manufacturing interests which are shown by the record to have combined with The Pullman Company in suppressing production of sleeping car equipment and in discriminating against the weaker railroads.

3. Whether a court, in selling a business pursuant to an antitrust decree intended to destroy a monopoly, must take into account the comparative qualifications, intentions and abilities of the various bidders and select from among them that one which gives greatest promise of removing the stifling effects of former monopoly and of expanding the competitive market for sleeping car service.

All of these questions are equally important, the answers to which elicit decisive reasons for reversing the trial court. However, it is the third question involving the power and responsibility of the court to select a purchaser of The Pullman Company, and the criteria to be applied by it in such a selection to which this brief will be primarily directed.

STATUTES INVOLVED.

The statutes involved are Sections 1, 2 and 4 of the Sherman Act of July 2, 1890, as amended (26 Stat. 209; 36 Stat. 1167; 50 Stat. 693; 15 U. S. C. 1, 2 and 4), the pertinent provisions of which are as follows:

> SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * (15 U.S.C. Sec. 1).
>
> SECTION 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the

trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * * (15 U.S.C. Sec. 2).

SECTION 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 and 15 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * * (15 U.S.C. Sec. 4).

STATEMENT OF THE CASE.

In its original opinion in this case the court found as follows:

> "We find a complete monopolization in the business of furnishing sleeping cars to railroads. This applies to the servicing of the cars and the furnishing of such cars both of which are completely controlled by the defendants." (R. 742)

As a remedy the court proposed a decree which provided that

(1) the sleeping car business shall be separated from the manufacturing of sleeping cars;

(2) the railroads may purchase used sleeping cars from The Pullman Company;

(3) The Pullman Company shall operate and service sleeping cars regardless of who manufactures them;

(4) any railroad may operate all or any portion of its own sleeping car business;

(5) The Pullman Company is to be obligated to furnish through-line sleeping car service;

(6) exclusive dealing contracts between The Pullman Company and the railroads shall be eliminated. (R. 744)

In addition, the court in the following language recognized the necessity of a pool of sleeping cars available to all railroads alike:

> "Even if a railroad could buy the cars it needed for ordinary day-to-day use there is still the problem of extra cars for peak loads. All roads have certain periods when the demands increase sharply. But in some, like the Missouri Pacific, Baltimore & Ohio, Southern Pacific, and the Pennsylvania, the variation, while perceptible, is comparatively slight throughout the year. Others, like the Florida East Coast, Seaboard, Boston & Maine, Burlington, and Northern Pacific have a large amount of seasonal passenger travel in extreme peaks and deep depressions. For instance, the Florida East Coast Railway's requirements may vary from 319 cars in the height of the season to 28 in the dull season. Conversely, those of the Boston & Maine go from a maximum of 173 in summer to a minimum of 54 in winter. The pool of sleeping cars that can be shifted from one road to another as demands vary is called for by sound economic policy. The plaintiff in this suit does not deny this fact and this Court appreciates it fully. It is relevant to be considered in this connection when the practicability of the operation of any railroad's sleeping cars is to be considered." (R. 735, 736).

Pursuant to this opinion both the Government and The Pullman Company submitted forms of a proposed judgment. The Government urged that Pullman Incorporated [1] should be directed to dispose of the manufacturing business and continue to operate an equipment service pool. On January 22, 1944, the court held that Pullman Incorporated should have the choice as to which one of its two present businesses it would continue to operate. (R. 759)

To this opinion Judge Biggs dissented on the ground that

[1] Pullman Incorporated is a holding company which owns all of the stock of Pullman-Standard Car Manufacturing Company (manufacturer of sleeping cars) and of The Pullman Company (operator of sleeping cars).

the retention of the manufacturing units by Pullman Incorporated would be contrary to the public interest. Among the reasons he gave is the following:

> ". . . the probable effect of the court's decree will be to compel the railroads of the United States, which must maintain adequate through sleeping car service, to purchase the stock of Pullman Company. The railroads are keenly competitive. Their need for sleeping cars varies widely. To what extent is each to contribute to the maintenance of the Pullman pool which we are unanimous in believing must be maintained? Who will police the operations of the pool in order to make sure that those carriers who contribute to the purchase of Pullman Company stock (contributions which must vary in amount in accordance with needs and resources) will treat their partners in the joint enterprise or the public without discrimination. I know of no power presently vested in the Interstate Commerce Commission or in any other government agency which would enable it to regulate such a pool operation." (R. 762)

On May 8, 1944, the trial court entered an order requiring the complete and perpetual separation of the manufacturing business and the sleeping car business of the defendants. (R. 764) Defendants elected to dispose of their sleeping car business. (R. 776)

Pursuant to this election, from September 1944 to March 1945 plans were formulated and a proposal put forward by Pullman Incorporated to sell the sleeping car business to the railroads. (R. 775) Not until May 12, 1945, however, was a definite proposition made to sell the stock of The Pullman Company (the sleeping car business) to the railroads. The price was to be about seventy-five million dollars. (R. 2246, 2254) Instead of taking affirmative action on this offer, a committee representing the railroads proposed a delay of eighteen months from March 22, 1946. (R. 2057)

On August 27, 1945 this appellant, Otis & Co., intervened in these proceedings and submitted its offer to purchase the stock of The Pullman Company upon substantially the same terms and for substantially the same sum as those that Pullman Incorporated had offered to the railroads. (R. 984, 1054) That offer conformed in every particular to the decree of the court. It assured not only complete separation of the sleeping car business from any manufacturing interest, but also complete separation of the sleeping car business from those railroad and banking interests which were shown by the record to have joined with The Pullman Company in discriminating against smaller railroads and suppressing the expansion of the sleeping car business. It went further and offered to replace the entire fleet with modern equipment and to enter on a nationwide promotion of sleeping car travel.

Some time later a combination of the railroads intervened for the purpose of purchasing the stock of The Pullman Company. (R. 1141) There were several non-railroad bids. (R. 984, 1056, 1113) A hearing was had by the court and evidence taken with respect to all the offers before it. (R. 2022-2402)

The court approved the offer of the combination of railroads disregarding the non-railroad bids. In so doing the three judges, as a court of equity, held that they could not substitute a judicial judgment for the decision of the proprietor of The Pullman Company. The court stated:

> "Approval of the sale to the railroads does not imply disapproval of other bidders. We are much impressed with all of them. We do not approve Pullman's selection because it has chosen the bid that brings it what it regards as the most favorable terms. We approve it because, following our direction to sell, it now appears with a buyer. That buyer is, as we said above, the most natural purchaser, because it has the legal responsibility for providing sleeping cars and comes in under terms which we are satisfied are in accordance with the judgment of this Court." (R. 1199)

Throughout its opinion the court made it clear that it considered entirely irrelevant any question as to which bid would most effectively dissipate the consequences of the monopoly and restore the expanding competitive market in sleeping car transportation.

The type of considerations which the court ignored in its judgment of approval of the railroad bid are shown in the intervening petition of Otis & Co. and in the evidence taken in support thereof.

The Bid of Otis & Co.

In its intervening petition Otis & Co. described in detail the stagnation of production and service which the Pullman monopoly had created in sleeping car transportation. It stated that the present fleet of about 6,250 heavyweight Pullman cars was in a deteriorated condition; that in design they were obsolete; that their weight was excessive causing unnecessary expense in fuel cost and roadbed repair and preventing speedy travel. It showed that if the railroads were to compete effectively with air and motor transportation the entire fleet must be replaced with modern lightweight equipment. (R. 984)

To meet this need to dissipate the effects of the past monopoly, and through competition to restore the expansion of the business which had been halted for years, Otis & Co. proposed to place immediate orders for sleeping car equipment to replace the entire fleet in an amount estimated at $500,000,000. (R. 985, 999) In addition it committed itself and the group it represented to set up a network of agencies over the entire United States to develop, promote and advertise recreational and educational travel. The commitment was described in its petition as follows:

"The Modern Service for the Railroads to Which Petitioner is Committed Upon Approval of Its Petition by This Court.

"Petitioner will refer herein to the service proposed by it as NEW PULLMAN SERVICE. Its purpose will be to furnish the railroads with equipment and provide services which they cannot easily or economically provide for themselves. In broad outline, NEW PULLMAN SERVICE will be designed to give the railroads a service to meet the developing needs of a nationwide market and thus supplement the separate activities of each railroad in its own area. It will have the advantage of mass buying power of large orders from competing manufacturers and thereby provide at mass production cost a pool of modern equipment to meet the through-line requirements and the seasonal demands of every railroad. It will service this equipment for the railroads in accordance with modern standards and needs. And it will do more. It will explore for the railroads the possibilities of the new opportunities for rail passenger transportation, created by the industrial developments of the postwar world. Thus NEW PULLMAN SERVICE will enable the railroads to meet the competition of the rapidly developing passenger transportation by air and motor. This will require nationwide promotion and advertising, coupled with systematic experimentation and research.

"To understand the possibilities of such a program, it is necessary to sketch the changed character of the railway passenger market after the war. Railway passenger transportation has lost its position as a natural monopoly. Air lines today predict the rapid expansion of their passenger market to 58,000,000 passengers annually. Pullman travel, except under the artificial conditions of the war years, never exceeded 40,000,000 passengers annually. Bus and automobile transportation may be expected to increase enormously with the development of better highways and more efficient motors. But all this does not mean that the market for rail travel is gone, or even that it has been impaired.

"The market is there, larger and richer than ever before. The nation today is well along into the second industrial revolution of electronics, giant power, light metals. Techniques are at hand to tap the resources of undeveloped regions. An expanding production insures a rising aggregate and per capita standard of living. The sections of the country are being rapidly brought together into a single vast metropolitan area. The rise in purchasing power means a great growth in the industries which cater to education, recreation and leisure. The market, however, can no longer be exploited by the noncompetitive philosophy of high cost, low usage, and security for investments in obsolete equipment." • • •

"Unified service permits standardization in railway passenger car design and procurement, with resulting obvious economies. The advantages of mass production have been well established in the United States but heretofore never realized in the production of railway passenger equipment. The outstanding example of mass production is the automobile industry, which produces superior cars at prices far below those obtaining in other countries. This is made possible by standardization of design, materials and methods, and is stimulated by open competition. In contrast to the practice of the automotive industry the building of railway passenger cars has been highly individualized. Cars have been largely custom-built, necessitated expensive engineering, cumbersome production methods and small unit purchasing of materials, including such items as seats, lighting fixtures, air-conditioning equipment, trucks, etc. The result has been to increase greatly the cost of the product. The economies to be realized by standardization of product and purchasing in large quantities are enormous.

"Modernization of sleeping cars will produce far-reaching beneficial effects for the railroads and the public. At the moment a dead weight of 2½ to 8 tons per passenger is carried, dependent upon occupancy. In the airplane it is now 1,500 pounds and it may be reduced to half that figure. With light metals the

weight may be materially reduced. The width of a car may be fixed, but the length of the train knows no such limit. Space may be enlarged with a sharp decrease in the weight that has to be hauled. The effect of dead weight can be minimized by the use of roller bearings, instead of the old-fashioned type of friction bearings. Moreover, in prewar days the Pullman car carried an average of ten passengers; the average occupancy of the car was decidedly below 50 per cent. Thus the cost of travel was made extravagant by the distribution of overhead costs over a small number of passengers. Modern equipment and improved service should keep the cars filled towards capacity, thus materially lowering cost. Another key to low cost is to keep the cars in use, not standing idle on sidetracks.

"Plans for Immediate Needs.

"To meet immediate needs, NEW PULLMAN SERVICE proposes to provide for the railroads, as soon as it can be constructed, the most modern fleet of sleeping cars and observation cars that competitive engineering brains and manufacturing facilities can produce. The great wartime increases in productive capacity in the equipment industries insure that all types of cars will be built in a competitive market. This fact and the development of new metals and new alloys, new materials, new designs, and new construction techniques further insure the manufacture of such equipment at costs much lower than the costs of existing equipment. This will enable NEW PULLMAN SERVICE to render service to the railroads at lower costs. And the railroads in turn will be able to experiment with reductions in rates to its customers, the public. Thus the railroads will, at an early date, be started on their way to meeting the competitive challenge of the air lines and the needs of present day travel.

"NEW PULLMAN SERVICE also proposes to provide other types of equipment necessary to meet railroad needs in an expanding and changing market for luxury travel. For example, to meet this increasing demand for through coast-to-coast service, NEW PULLMAN

SERVICE will offer to furnish the railroads every type of equipment which will make fast schedules for these long journeys attractive to the public." • • •

"NEW PULLMAN SERVICE *will Promote the Unexplored Market in Passenger Travel.*

"There is a vast untouched market in rail passenger travel ready to be exploited. It was not exploited in the past because railroads considered the passenger business unprofitable. Its cost was beyond the reach of the great mass market composed of persons of moderate means. It was the automobile industry that seized the opportunity to exploit that mass passenger market. Indeed, it went further and reached even the low-income groups." • • •

"Railroads today have as great an opportunity to develop passenger travel as the motor car industry had in 1920. They need only reach down to the mass market of persons of moderate income. The extent of this market is limited only by the vision and energy of those who attempt to exploit it." • • •

"Today persons of moderate income take long unpleasant trips by automobile only because they cannot procure automobile service at their destination for a moderate cost. The possibilities of encouraging independent local organizations to fill this need at low cost at the end of the journey by train or at stop-overs are unlimited. NEW PULLMAN SERVICE should insure a constant flow of passengers by rail to such independent agencies so that it would no longer be necessary for persons on a vacation to take the entire trip by automobile. By the development of this possibility, the automobile will become a supplement to rail travel,—a means of increasing the number of passengers carried by train instead of a competitor taking away passengers from railroads." • • •

"The development of this market requires a network of supplemental means of travel which will carry passengers from rail heads to outlying areas. It is not

suggested that NEW PULLMAN SERVICE own or operate these supplemental agencies. They can be independent and still serve the railroads through NEW PULLMAN SERVICE because nationwide promotion of travel gives them a mass market of passengers." (R. 996-1001)

The above commitments were made by the Otis-Young-Kirby group represented by Otis & Co. This group required no advance guarantee that any railroad accept the service of the New Pullman Company. Each railroad was free to take all of the service or any part of it or none as it pleased. Some of the larger railroads had already ordered new equipment for their own use. The Otis offer did not propose to take over such equipment and in no way did it set obstacles in the way of that kind of development. Its chance of success lay in its ability, through mass purchasing, the use of up-to-date cars, the elimination of costs incident to obsolete methods and equipment and the stimulation of a nationwide demand to furnish a service that would be cheaper than the railroads could furnish at their own expense. There was to be no interference with the freedom of choice of any railroad. A new independent source of supply of equipment and service was to be provided. It was to be offered to the railroads on a competitive basis. (R. 2036, 2037, 2075, 2531, 2546, 2547, 2586-2587)

The importance to weaker railroads of this new competitive supply of service and equipment is also shown in the record. The demand for sleeping cars and vacation equipment is seasonal. Weaker railroads are financially unable to build and operate sleeping cars for peak-load and through-line service. For that reason if the railroad combine was to become the only—or even the principal—supplier of Pullman car service, weaker connecting lines would be at a constant disadvantage unless they became the economic captives of the stronger roads. Without an independently owned and constantly expanding pool of modern sleeping car equipment the evils of the old monopoly would persist

in a different form. The carrier able to build and own its own equipment would be in a position to dictate terms to the weaker lines. Such a situation would aggravate the old problem of the strong and the weak road. (R. 2090-2093). Furthermore, vast and undeveloped recreational areas of our country are served by weak roads, which are unable to develop them for the benefit of the public and of the state without access to a pool of modern sleeping cars and without the help of a nationwide promotional service devoted to the expansion of passenger travel. (R. 2066)

The petition concluded that the present static condition into which the sleeping car business had fallen—due to the monopolistic restrictions of the past—could only be corrected by the court's selection of a bidder who was actually willing to risk its capital in a program for the progressive development of the sleeping car business. (R. 1002)

The court refused to weigh the evidence on these considerations or even to consider the bid of Otis & Co. Nor did the court make any inquiry into or any attempt to appraise the willingness and capacity of the railroad combine or of any other bidder, to end the conspiracy, dissipate the consequences of monopoly, or restore free enterprise to the sleeping car business.

Effects of the Court's Ruling.

The offer of the railroad combine does not contemplate an expanding pool of sleeping cars. On the contrary, its offer, considered in the light of the evidence, makes clear its determination to prevent the creation of a source of supply in competition with the new equipment being constructed by the larger roads. These facts were recognized by the court for, in approving sale to the railroad combine, it stated: ". . . we do not think it likely that The Pullman Company, itself, will purchase new sleeping cars. . . ." (R. 1197) Thus the court failed to make effective its findings that a "pool of sleeping cars that can be shifted from

one road to another as demands vary is called for by sound economic policy" and that "through service is a modern essential, but most railroads cannot, by themselves, provide such through service." (R. 736)

Under the court's decree even the present pool is to be dismembered, the lion's share going to the Pennsylvania and New York Central railroads. The expressed intent in the plan of the railroad combine is that The Pullman Company shall, during the interim period, be stripped of its equipment, reduced to a servicing company, and then sold to a so-called "independent" purchaser. (R. 1165-1168) There is no assurance that such sale will ever be made; but, if it is made, the new company will be independent in name only. As the nominee of the larger roads in the combine, its selection will depend upon committing itself to a policy of sleeping-car transportation which these dominant roads believe to be "sound."

Thus, for at least three years there will be complete stagnation in the development of a nationwide pool. Meanwhile, the larger railroads are placing orders for hundreds of sleeping cars. (R. 2531, 2546, 2547) At the end of the period, the stronger roads will have achieved a position of domination of the sleeping car business. The weaker roads will be dependent on them for their seasonal needs and through-line requirements. (R. 2092)

Under the offer of the railroad combine, the stock of The Pullman Company would be owned in accordance with the percent of sleeping cars operated by the several carriers. (R. 1166, 1167) This means that the Pennsylvania and the New York Central railroads will own in excess of 30 per cent of the stock, the balance being scattered among at least 40 railroads. This would give effective control of The Pullman Company to these railroads. Combined with a few other large railroads operating sleeping cars—the Santa Fe, Union Pacific and Southern Pacific railroads—control of a majority of the stock of The Pullman Company is assured. The method of selecting directors further evidences this

control. The plan in the offer of the railroad combine provides for a board of directors for The Pullman Company of 15 members, 3 from each of three regions, the East, the Southeast, and the West, the remaining six to be chosen at large. (R. 1163) Thus, through the stock ownership and organizational set-up provided for in the offer of the railroad combine as approved by the court, and through the interlocking relationships hereinafter discussed, the major railroads and affiliated interests would effectively control the sleeping car business of the country.

The kind of policy which the larger railroads consider "sound" was called to the attention of the trial court by Otis & Co. Evidence of that policy is found in the record in the original trial. It is also to be discovered in documents introduced at committee hearings in Congress of which the Court may take judicial notice. For example, the so-called "Western Agreement" was investigated by the Committee on Military Affairs of the United States Senate in 1944. Under that agreement the western lines by concerted action stopped competing improvements in sleeping car transportation. The western commissioner, the appointee of the Western Association of Railroad Executives, hampered and prevented the introduction of air conditioning in railroad cars. We have set out in Appendix A relevant portions of the testimony before the Congressional Committee. We believe that this history of the railroads' attitude towards expanding the supply of equipment is significant and should have been considered by the court in connection with the plan in the offer of this railroad combine which is equally opposed to expansion.

Further light on the meaning and intention of the railroad plan is found in the record of this case, excerpts of which we set out in Appendix B. Briefly summarized, that record shows that the Pennsylvania and New York Central railroads conspired with The Pullman Company to obtain more than their proportionate share in Pullman revenue. It shows that Pennsylvania Railroad and New York Central

attempted and succeeded in maintaining a strong position in the management of The Pullman Company. It shows that Pennsylvania Railroad and New York Central were co-conspirators with Pullman in retarding the introduction of lightweight equipment; that they assisted in restraining the introduction of new sleeping car equipment.

The Interest of the Several States in Expanding Transportation.

The States of California, Colorado and Georgia filed intervening petitions. (R. 1104, 1112, 2235) California presented a recitation of facts which compelled the conclusion that an expanding sleeping car service could not be expected from a railroad-dominated combination. The facts presented were either contained in the record of the case or they came from public documents of which this Court could take judicial notice. California urged the approval of the sale of the Pullman service to an independent purchaser in order to put an end to the former monopoly. Georgia joined in the California petition. (R. 2235-2239) Colorado in a supplemental petition stated that it took no position for or against the railroad acquisition of The Pullman Company. (R. 1170) However, it as well as the other intervening states concluded their petitions as follows:

> "The Western States must have adequate passenger transportation service to stimulate their future growth. Automotive and air transportation will not suffice.
>
> "The great bulk of passenger transportation must continue to be by rail. This transportation will not take place unless the antiquated and obsolete Pullman Service is replaced with a modern and streamlined service.
>
> "The entertainment of and caring for visitors and vacationists to the States of Colorado and California has become a business of first magnitude. Great expenditures are made in soliciting this patronage. A large percentage of prospective visitors must rely entirely upon railroad facilities for their transportation.

In 1941 a total of 1,000,025 relied upon railroad transportation to visit the State of Colorado. The efficiency of such transportation is a matter of vital interest to the States of Colorado and California. Failure on the part of the Pullman Company to plan and carry into effect an energetic and attractive program for better equipment and service is a natural and obvious result following the court decree. It is of vital interest to Colorado and California that the provisions of the decree be fulfilled without unnecessary delay.

"Over two million persons came to California in 1941 as visitors. Over 1,000,000 visitors in Colorado in 1941 relied upon railroad facilities for their transportation; visitors by train, 1,000,025 [in] 1941; by automobile, 2,000,079; by bus, 263,000, and by airplane, 7,800. From these visitors come future residents who in time become interested in western industries. A passenger service, adequate and modern and priced to suit the purse of the average citizen will increase this flow of traffic.

"Pullman Service has not furnished such a service.

"A request for a delay of 18 months by the railroads does not augur well for the improvement of the service." (R. 1110, 1111)

Although such considerations lie at the very heart of the problem of relief, the court put them aside as irrelevant.

The Recommendation of the Department of Justice.

After the evidence was in, the Department of Justice at the request of the court made its recommendation. (R. 2242, 2558, 2261) It advised the court that the Otis & Co. bid would best serve the paramount public interest in future competition. On the negative side it advised the court that acceptance of the bid of the railroad combine "would substitute a more vicious monopoly than that stricken down by the court." (R. 2561) The court did not discuss the validity of the government's objections. It held the considerations urged by the Government were beyond its authority to consider.

SPECIFICATIONS OF ERROR.

The nineteen assignments of error relied on in this appeal may be summarized in the statement that the court erred in failing to take the necessary precautions to insure the sale of the stock in The Pullman Company in such a way as to accomplish the ends for which the suit was brought. This general statement may be broken down into these fundamental errors:

1. The court erred in delegating to Pullman Incorporated, an adjudicated wrongdoer, its power as a court of equity to select the successful bidder.

2. The court erred in giving no consideration whatever to the recommendation of the Department of Justice.

3. The court erred in permitting a combination of the principal railroads in the United States, many of which are in competition with each other, to acquire control of a pool of sleeping cars and facilities now owned and operated by The Pullman Company, thus in practical effect eliminating competition in the business of providing sleeping cars and service to independent competing railroads.

4. The court erred in ignoring facts in the record which bore on the relationship of the members of the railroad combine with the former conspiracy and which required at the very least a further inquiry.

5. The court erred in ignoring the public interest in expanding transportation.

6. The court erred in refusing to evaluate the various bidders according to their respective qualifications, intentions and capacities to dissipate the effects of the former monopoly and to expand the competitive market which had been destroyed by it.

ARGUMENT.

I.

Critique of the Court's Opinion.

The dominant error, running through all the various separate errors made by the court is best described in its own words. The court dealt with the sale of the stock of The Pullman Company as a "by-product" not the "end-product" of the suit. It thus regarded a mere physical separation from Pullman Incorporated—whatever corporate ties were left uncut and whatever hazards to the public interest were allowed to endure—as enough to satisfy the law. It took no steps to make certain that the separation it had decreed would prove a separation in fact or to assure itself that a sale to the railroad combine would be a sale to a party distinct from the seller. In turning an end-product into a by-product, the court below committed a number of errors, because it did nothing to assure itself that a sale to the railroad combine would serve the ends for which the suit was brought.

(*a*) *The court below, by allowing Pullman Incorporated to select its own successor, delegated to the malefactor a power inherent in the process of equity.*

The sale of the stock of The Pullman Company is not to be viewed as a thing apart. It is set within an anti-trust proceeding; it is a step in bringing the sleeping car business within the tolerance of the law. To insist, as did the court below, that since Pullman Incorporated appeared with a buyer, the transaction must be approved, is to treat the sale as if it was of concern only to the contracting parties and was in no way affected with a public interest.

It is submitted that Pullman Incorporated had no legitimate interest which would give it any voice whatsoever in the selection of a buyer. It had been ordered to divest itself of The Pullman Company. It had been assured a reason-

able compensation for the properties with which it had been forced to part. In respect to the price to be paid for the stock and the terms and conditions of sale, the various bids were substantially equivalent. There was no pecuniary or financial reason for the seller to find one offer more advantageous than another. If Pullman Incorporated was to choose, its judgment would have to turn upon criteria which only a court of equity could apply.

Criteria were at hand to guide the court below in its choice. The sale offered the conflicting possibilities of furthering or preventing the restoration of effective competition to the sleeping car business. The court was under a duty not to approve any prospective purchaser—and certainly not the elect of the wrongdoer—until it had taken reasonable precautions to make certain that the sale gave promise of serving the public interest by dissipating the effects of the conspiracy. And when four distinct offers were before it, the court committed serious error in not bothering to evaluate them in terms of the objectives of the antitrust law. That obligation rests squarely upon the court below. And it is not equity for that court to delegate its judicial duty to a party it has adjudged to be a wrongdoer.

(*b*) *The opinion approves without adequate inquiry, the sale of the stock of The Pullman Company to parties shown by the record to be co-conspirators.*

If the divestment ordered was to be realized in fact and not in word alone, the court was under a duty to make certain that the new purchaser was alike independent of the seller and guiltless of wrong doing. The mere separation in corporate identity is not enough. It is a matter of common knowledge that in the railroad field, the power-to-make policy lies with a group of banks and insurance companies which seek security for investments rather than returns from capital risked in progressive enterprise. The task of the court below could not stop with looking at

appearance. In giving effect to public policy it was under a duty to ask where the power to make decisions lay, to probe to the actual seat of discretion. Anything short of this would fulfill a legal ceremonial without furnishing the information essential to the court's remedial task.

(c) *The control and management of the railroad combine is inseparably tied in with the control and management of the Pullman-Standard Car Manufacturing Company.*

The interests which control and manage Pullman Incorporated are the interests which control and manage the railroads which in combination are seeking to purchase The Pullman Company. Indeed, at the time of the hearing on petitions for approval of offers to purchase, out of a board of 15 directors of Pullman Incorporated, none were free to select a purchaser other than a purchaser determined for them by the other institutions they represented. And these other institutions are preponderantly railroads, members of the combine, and their traditional bankers. These facts are conclusively established in the record as set forth in Appendix C hereto.

At the time of the hearing, 27 railroads were in the purchasing combine. (R. 1141, 1142) Of these 4 were directly and 14 indirectly (through various interrelationships) represented on the board of directors of Pullman Incorporated which controls Pullman-Standard Car Manufacturing Company.

In every move he made, Mr. Crawford, president of Pullman Incorporated, took counsel with his directors and the selection of the rails as the successful bidder was made by them. Yet J. P. Morgan & Co. and the Mellon interests, as the record discloses, dominated both Pullman Incorporated, which was parting with its property and the buyer which it elected to come into possession. Such facts were not considered by the court, and along these lines no inquiry was instituted to guard the public interest.

Testimony from the record and from public documents of which the court below agreed to take judicial notice

has been cited to the effect that actual choice of the offer of the rails was made by representatives of the rails; that, back of formal corporate organization, the closest and strongest bonds of unity exist between Pullman Incorporated and the rails; and that, in terms of past performance and current unbroken ties, the railroad combine can not safely be entrusted with the control of The Pullman Company. But, assuming for the sake of argument, that the testimony falls short of being conclusive, the least compelling view is that it establishes a strong presumption against ownership and control of the sleeping car business by the railroad combine. As the custodian of the public interest, which it is the very purpose of the anti trust acts to serve, the court was under an obligation to explore all these issues. The questions could be succinctly put, the answers were easily to be found either in testimony before it, or in documents of which the court could take judicial notice. The result of such an inquiry—whatever it might yield—was a necessary antecedent to an approval of the sale to the railroad combine.

Nor did the court explore the effect on future combination of ownership of the Pullman service by ninety-five percent of the railroads. It must be evident to anyone that the railroad combination will be controlled by the dominant railroads. It follows that they will have a strong incentive not to operate the pool in a way that will strengthen their weaker competitor for passenger traffic. Yet the court did not compare the advantages of selling to an independent concern which offered to expand the Pullman service on a nationwide scale for all railroads alike.

(*d*) *At the end of an interim period the railroad combination propose to sell to an independent. Yet the court did not consider the obvious fact that an independent selected by the larger railroads would necessarily be the captive of the combination to which it owed its power.*

The net effect of the court's decision has been to exclude a vigorous independent competitor from the business and to entrust The Pullman Company to the bidder who promises to do least in the development of sleeping car service. The court has refused to consider offers intended to put the maximum of supplies and equipment on the market. It has sanctioned a sale which will prevent the replacement of the obsolete worn-out equipment by a fleet of modern light-metal cars. It has virtualy enjoined a national sales organization to promote the progressive increase in the volume of educational and recreational travel. It can hardly be denied that the competition between sleeping-car service offered by the several railroads and an independent company would be to the advantage of the public. It is hard to see how an independent service offered to the various railroads on a voluntary basis could injure any legitimate interest which is theirs. The threat of such a service can only be to some equity in monopoly which the combine of carriers seeks lawfully to vest.

The action of the trial court, therefore, raises the question which will be the principal theme of this brief. This question may be given an affirmative or a negative statement. In affirmative terms it is that it is the duty of a court, in effecting a reorganization of a business pursuant to an antitrust decree, to take into account the comparative intentions, qualifications and capacities of the several bidders to effect the ends for which the suit was brought. In negative terms it is that the court cannot, without rigorous inquiry, sanction a sale to a combination of members of the same industry controlling 95 percent of the volume of traffic in the face of facts warranting the presumption that the evil sought to be remedied will reappear in a new form.

We shall, therefore, in the argument which follows, insist that the judgment be reversed on the ground that the court below held as a matter of law that the merits of

the several bids were not a subject for judicial scrutiny. We also insist that the court delegated its duty to a private party, neglected to guard the public interest in supervising the sale, and failed to apply to the selection of a buyer all these criteria of law enforcement which should have guided choice.

II.

A Decree Dissolving a Combination in Restraint of Trade Is in Effect an Equity Reorganization for the Purpose of Disposing of the Property to the Persons Most Capable and Best Qualified to Re-Establish the Competitive Market Which Has Been Destroyed by the Former Monopoly. Therefore, the Type of Business Judgment Which the Court is Accustomed to Exercise in Ordinary Reorganization Must Be Used in Selecting the Transferree of the Property.

In an equity reorganization the interests to be protected are the conflicting types of stockholders and creditors. In approving a plan the court must and always does exercise its judgment as to the comparative abilities of various transferees to conduct the business successfully in the future for the benefit of those conflicting interests. No one would suggest that the court can wash its hands of this problem and accept the nominee either of the bankrupt or of any particular class of creditors on the ground that a judgment between bidders was beyond the authority of the court.

The same principles apply to an equity reorganization under the Sherman Act, though it should be noted that the interests represented are different. The paramount interest in an ordinary equity reorganization is the interest of the creditor. The paramount interest in a government suit to enforce the antitrust laws is the public interest in expanding competition. There is no other possible purpose in the institution of an antitrust proceeding by the government.

The case of *Continental Insurance Co.* v. *Reading Co.*,[2] is an illustration of the kind of economic considerations and business judgment a court of equity must exercise in an antitrust reorganization. That case involved a separation of interlocking interests controlling railroads and coal mines contrary to the Sherman Act. An interim period was necessary before certain of the properties could be sold, but the court during the interim did not leave the properties in the control of the culprit. Instead it put its own trustees in charge until final disposition. The Attorney General made a recommendation based on business facts which the Supreme Court as a matter of course considered. It modified that recommendation in the light of economic considerations which had occurred subsequent to the Attorney General's opinion. The type of considerations underlying the Court's judgment is illustrated by the following passage:

> "It is asserted further by the Reading Company, and not denied, that, when this decree was entered by the District Court, the monetary situation was such that it would have been impossible to secure a purchaser of the Reading Coal Company properties at any fair price; that, indeed, the transaction could not have been financed at all.
>
> "The considerations influencing the District Court and the government against a drastic readjustment of the interests of the bondholders under the general mortgage and the holdings of the two offending companies were of manifest weight in the then business and monetary situation. Even now this court would hesitate to order a sale of this kind of property worth probably $100,000,000 with confident hope of realizing an adequate amount with the necessary restrictions as to the purchaser. We agree with the Attorney General in his disinclination to insist upon such a sale under the circumstances. Since the time of settling the decree, however, a change for the better has come in the finan-

[2] 259 U. S. 156.

> cial situation. We think that this justifies us now in making some modifications in the plan, which were not presented to the parties or considered by the court, possibly because they might have been unwise in the critical conditions then existing. They involve a departure from the contract provisions of the general mortgage and the bonds it secures." (p. 170)

It is true that such judgments can only be informed guesses as to the future based upon the most reliable evidence which the court can secure. Nevertheless, the duty to make such judgments is inescapable from any type of equity reorganization. If such considerations are ignored in an antitrust reorganization, the result of the suit may for the future result in the creation of a stronger monopoly than that which existed in the past.

In this case the old monopoly had left the public and the railroads with an obsolete fleet of sleeping cars. A compelling need—both to the weaker railroads and to the public—was replacement of that fleet by an independent in a position to offer the service to all the railroads alike on the same terms. It is essential that the independent shall have no ties with the former conspiracy. It is imperative that the reorganized company be not dominated by any group having an interest which runs counter to that of the public or the weaker railroads.

Yet the court below approved the transfer of the sleeping-car business to a group of carriers dominated by the New York Central and the Pennsylvania railroads and under the influence of the banker group closely connected with the major railroads. It put to one side the history of that group in failing to expand the Pullman fleet. It ignored the positive evidence of the conspiracy between that group and The Pullman Company to discriminate against weaker railroads. It overlooked the obvious financial interests of the larger passenger-carrying roads in maintaining a competitive advantage over the smaller roads. Finally, it eliminated from the field the only supplier of equipment and

service that affirmatively promised to replace the obsolete fleet.

The reason it gave was as follows (R. 1199):

> "A great deal of argument has been presented to us during the hearing about the majority of the companies which own and operate the railroads of the country. They are said to be sleepy and unprogressive. The roads in turn, have offered testimony to the effect that they are industrial greyhounds, straining upon the start. We make no finding of fact on this point, nor confer either encomium or epithets. We are concerned only with a small fraction of the total railroad business, that which has to do with sleeping cars. *This part will probably rise little higher than the general level of railroad competence. We do not think, in any event, it is within judicial responsibility or competence to make it do so.*
>
> "We are also told that the railroads are dominated by a group of bankers and that the influence of the latter, if not sinister, is at least unprogressive and monopolistic in its tendency. *When we reach this question we are beyond the scope of issues in this lawsuit which had Pullman, not the railroads, as defendants.* The record tells us nothing of the operations of railroad bankers nor of the war between them, if such there is. Surely we should be going far beyond proper judicial process if we played, either way, any hunches we may have, about this question." (Emphasis supplied)

The error of the court may be highlighted by applying such reasoning to the ordinary equity reorganization where the qualifications of bidders for the property to be sold are under consideration. A judgment based upon the reasoning of the court below in this antitrust case would make no sense whatever when applied in an ordinary equity reorganization proceeding. Such a summary disposition of the case ignoring the public interest involved constitutes reversible error.

A court of equity in an antitrust reorganization is confronted with two closely connected, yet distinct, tasks. The

one is analytical; it must discover and lay bare the wrong. The second is constructive; it must devise a remedy to eliminate the evil it has found. The two tasks drive to the same result. The analysis is of no avail unless it is followed by the relief; the remedy is likely to miscarry unless it is based upon the analysis. The same resources—hearing, the calling of witnesses, the taking of evidence—are alike available for both tasks. The duty upon the court to pursue all pertinent issues, to examine all relevant testimony, to avoid arbitrary decisions, to give practical effect to the law, applies equally to the two parts of the task. Unless relief can be made effective, the suit is of no avail.

If relief is to be made effective, the offers-to-purchase must be reviewed by the court with the most critical scrutiny. Pullman Incorporated, the seller, has been adjudged to be a law-breaker. The easy, in fact an obvious way to escape the law, is for the malefactor to install its own successor. The court fails in its duty if it is not at pains to make sure that the control which it has ousted is not perpetuated in a new form. The railroads, as the record of the case makes clear, are co-conspirators with Pullman Incorporated. The evidence before the court establishes a strong presumption that they are not lawfully qualified to take over The Pullman Company. Instead of resolving such doubts by proper judicial inquiry, the court has acted as if the identity of the buyer, its financial and business connections, its repute is for being law-abiding, its ability in respect to antitrust to come into court with clean hands, are irrelevant. If the relief it decrees is to be effective—and not merely nominal—the court is under obligation to scrutinize closely the credentials of the successor which is to be installed; to inquire thoroughly into the matter of whether the railroads are free agents; to make certain beyond any reasonable doubt that banking and financial houses—which stand to gain by restraint of trade—are not in control of any party or group seeking to buy. It is the public interest which Congress seeks to protect through the

antitrust suit. The court must assure itself that this public interest is not through a sale which it approves put in future jeopardy.

The court's conduct of the instant case does not measure up to these standards. It has throughout acted as if the discovery of wrong was its duty; as if relief was a matter of minor importance. Yet the established rule of equity affords this court adequate power to make the election and to shape the terms of sale. It is the mark of equity that it can carry its remedy to the very character of the wrong. It has, as Mr. Justice Douglas has put it,[3] "a wide range of discretion . . . to mould the decree to the exigencies of the particular case." In fact, as he elaborated in *Hecht Co.* v. *Chester Bowles*, 321 U. S. 321, 329,

> "The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . ."

The demand is, as succinctly put by Mr. Justice White in *United States* v. *American Tobacco Co.*, 221 U. S. 106, 185, "to award relief coterminous with the ultimate redress of the wrongs which we find to exist." As was neatly stated by Mr. Justice Cardozo, in *Atlantic Coast Line Railroad Co.* v. *Florida*, 295 U. S. 301, 316, a court of equity is "to mould its plastic remedies in adaptation to the instant need." As was said by Mr. Justice Stone, in *Virginian Railway Co.* v. *System Fed. No. 40*, 300 U. S. 515, 552, "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."[4]

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[3] *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185.

[4] Noted by Mr. Justice Frankfurter, in *Scripps-Howard Radio Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 15. See also *Pennsylvania* v. *Williams*, 294 U. S. 176, 185; *United States* v. *Dern*, 289 U. S. 352, 360; *United States* v. *Morgan*, 307 U. S. 183, 194; *Inland Steel Co.* v. *United States*, 306 U. S. 153, 156; *DiGiovanni* v. *Camden Fire Insurance Ass'n.*, 296 U. S. 64, 73.

This is not to say that all parties in interest are not free to suggest to the court plans of divestment. But all proposals to purchase, all terms and conditions of sale, must be appraised in respect to relative capacity to effectuate the objectives of the decree. In *Continental Insurance Co.* v. *Reading Co.*, 259 U. S. 156, 170, the Supreme Court made "some modifications in the plan which were not presented to the parties or considered" in the lower court. Although this case may be viewed as lying on the frontier of judicial control, even ordinary practice puts emphasis upon the court's ultimate responsibility. Note as typical, the decree in *United States* v. *E. I. duPont de Nemours & Co.*, 188 F. 127, inviting all parties to submit plans to the end that the court may ascertain and determine upon a plan; and *United States* v. *Great Lakes Towing Co.*, 208 F. 733, 746, which seeking to give play to every legitimate interest, provides that the combination should be so dissolved as to neutralize the force of the unlawful power."

In an action like this, where the ends sought are to secure conduct in accordance with law, there is no reasonable place in which to lodge the power of election other than the court. For, as it was so compellingly put by Mr. Justice Frankfurter, in *Scripps-Howard Radio Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 15, "Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes." And as stated by Mr. Justice Reed, in *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 726, the court may "use quite drastic measures to achieve freedom from the influence of the unlawful restraint of trade."[5]

[5] An illuminating, even if formally not authoritative, statement of the matter has been given by Mr. Justice Rutledge, dissenting in *Hartford Empire Co.* v. *United States*, 323 U. S. 386, 441-442: "The antitrust injunction suit is in form 'a proceeding in equity.' In substance, it is a public prosecution, with civil rather than criminal sanctions, for vindication of public right and for redress and prevention of public injury. To regard the fashioning of appropriate relief in such a suit

For in all such actions, as Mr. Justice Douglas has said in *Hecht Co.* v. *Bowles*, 321 U. S. 321, 331, "the standards of the public interest not the requirements of private litigation measure the propriety and need" of the relief to be decreed.

III.

The Court Erred in Giving No Weight Whatever to the Recommendation of the Department of Justice That the Bid of Otis & Co. Be Accepted.

An analogy to the Holding Company Act is in point here. That Act, in intent and design, is at once a corporate securities and an antitrust act.[6] Its purpose, within the specific field of its operation, is to break up monopolistic control. By its provisions the Securities and Exchange Commission is empowered to make a judgment on the type of organization which best effectuates the objectives of the Act. In its decision the court is required to follow the recommendations of the S. E. C. if they have support in the record. The reasons for this are quite obvious. The S. E. C. is an expert body, familiar with trade practices in its field, without an interest of its own to serve, and with an obligation to give effect to public policy. It has opportunities to make extensive investigations on which to ground

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as identical with the same function in private litigation is to disregard at once the former's statutory origin, its public character, and the public interest it protects. The equitable garb of the proceeding therefore does not determine or conceal its true character. Nor does it limit the required relief merely to what will prevent repetition of the illegal conduct by which the combination has been formed, its property acquired, and its dominating position secured." It is of note that this statement is quite in accord with that just quoted in which Mr. Justice Reed set down for the Supreme Court the rule of equity in antitrust cases.

[6] In *North American Co.* v. *S. E. C.*, 328 U. S. ——, 66 S. Ct. 785, 797 the court stated: "In fashioning the remedy decreed by Section 11 (b) (1), Congress was following a pattern set many years ago by decisions applying the Sherman Antitrust Act . . ."

its decisions, it has acquired a wealth of experience in dealing with varied and unlike situations. It possesses not only facts, but an understanding of affairs in action upon which the courts can rely. It alone, among all parties concerned with or participating in a proceeding can give intelligent representation to the public interest. In the domain of antitrust the Department of Justice possesses a knowledge and understanding comparable with that of S. E. C. in respect to corporate organization. In fact the Department of Justice is the only governmental body that makes investigations of monopolized industry from the point of view of the public interest in expanding competition. All other parties before the court in antitrust suits instituted by the government represent private interests. No other agency—and certainly no single court—has the competence gained from continuous experience with the economic problems involved in Sherman Act enforcement.

Of course, the weight which should be given to the recommendations of the Department of Justice in an antitrust reorganization is nowhere in the statutes precisely spelled out. The authority to make recommendations is not conferred by any express provision of the antitrust law. It is rather a necessary consequence of that law which compels the Department to make elaborate investigations as part of the enforcement program, for Congress has placed the entire responsibility for the preservation of competition through the enforcement of the Sherman Act on the Department of Justice. For it must decide when not to prosecute, as well as when to prosecute; and every decision it makes is a judgment concerned to protect the public interest. Its studied decisions, shaped by searching inquiry and a careful balancing of values, are entitled to serious consideration. That this is so is shown in the opinion of this Court in *Continental Insurance Co.* v. *Reading Co., supra.*, wherein the recommendation of the Attorney General with respect to an antitrust reorganization was considered and discussed at length.

In the instant case the District Court asked the Department of Justice for its views on all bids and its recommendation as to the bid which would comply with the provisions of its judgment of May 8, 1944. (R. 2242) Pursuant thereto the Department of Justice submitted its views in detail and recommended the approval of the proposal submitted by Otis & Co. as "the only offer that meets both of the essential requirements of the Court's order, namely, competition in both the manufacturing of sleeping cars and in the furnishing and servicing of sleeping cars . . . " (R. 2556-2561) The court then completely ignored that recommendation. This we submit is reversible error.

IV.

The Court Erred in Delegating to the Railroad Combine the Ultimate Responsibility for the Selection of an Independent Purchaser of the Sleeping Car Business.

The necessity for the ultimate disposition of the pool of sleeping cars to an independent company is as obvious as the necessity that a public utility should not be controlled by its larger customers. It is, therefore, not a matter of surprise that the railroad combine should propose that, after an interim period of three years, The Pullman Company, stripped of many of its assets, should go to an independent. It should be noted, however, that the bid of the railroad combine offers no assurance that this disposition to an independent even in a limited form, will be made. It does, however, allow a railroad to withdraw from the combine if such disposition is not made. The economic benefits which the railroads might secure through such withdrawal are negligible. The probability is that at the end of the interim period the sleeping car pool available to all the railroads will consist of equipment vastly inferior to that purchased by the larger railroads. We will not discuss that here. We simply point out that although the intention to transfer the sleeping car business to an independent is declared, there is no assurance that it would occur.

The net effect of the decision is, therefore, as follows: a court of equity has delegated to a group of railroads, whose dominating influence has been linked with past discriminations against weaker railroads, the court's power to select the purchaser, reserving no control over the carrying out of such a plan. Ordinarily a court faced with an interim situation appoints its own trustees who are responsible to the court and who must report to it. Even this protective device is ignored in the dispositions made below.

We submit that the court had no power to delegate its duty in the selection of a purchaser even to a disinterested group. It could not appoint a committee of prominent businessmen and tell that committee to select an independent purchaser. It might have used a master for this purpose but in such a case it would have passed upon the recommendations of the master. Here at the end of three years, the railroad combine, if its expression of intent is carried out, would act as a master in chancery to determine the disposition of the property without any control by the court.

Only two reasons were advanced by the court for this extraordinary delegation of power. The first was that The Pullman Company has obeyed the former order of the court and brought in a bidder. The court seemed to think that this deprived it of jurisdiction to consider the matter further. We assert the exact contrary. The least the court could do was to ask the seller to bring in a lawfully qualified bidder; and, since the seller had been adjudged a malefactor, the burden of proof in respect to the character and capacity of its candidates was upon it. In any event the power of the seller should not have gone beyond nomination and any party nominated by it to take over should before selection by the court have had its credentials scrutinized with utmost care. The fact that the bidder had been chosen by the culprit should have led the court to impose upon itself the highest degree of care. The history of the combination between The Pullman Company and the railroads should have increased the court's reluctance to approve

such a sale. And finally, the fact that the railroads proposed affirmatively the policy of non-expansion of the Pullman fleet made their bid the one which gave the greatest promise of continuing scarcity of facilities for Pullman travel.

The second reason given by the court for delegating its duty to select the independent, that is to operate eventually the pool of sleeping cars, is stated as follows:

> "The railroads are the natural and obvious people to do sleeping car business. They are the ones who own the rails on which the cars are drawn; it is their locomotives which pull sleeping cars as well as coaches and freight cars. It is the railroads' obligation to furnish the sleeping car service. This we think to be a point of highest importance in this connection. 'Pullman service is like a public utility,' we have been told. 'Would you allow a public utility to be run by its chief customers?' The analogy is almost completely inaccurate. Sleeping car service, like dining car service, is part of the essential business of carriage of passengers in a country where distances between points are as they are in the United States. The carrier is obligated to furnish the service or see that it is provided. Were it not for the historical accident of the independent development of the sleeping car company as a concessionaire to furnish the service, one would expect to find it furnished by the railroad itself." (R. 1195-1196)[7]

The court's observation that the independent development of the sleeping car business was "an historical acci-

[7] In passing it may be stated that this reason is in conflict with the court's assertion that it has no authority to make a business judgment. The above quotation is nothing more or less than a business or an economic judgment concerning the proper operation of the railroads. We do not complain of it on that ground. As we have reiterated, it is the duty of the court to make an economic judgment in an antitrust reorganization. We do say, however, that this particular economic judgment is in conflict with the record. It is made without consideration of the evidence; it is historically inacurrate; it will not provide for competition in the future.

dent" is incorrect. Independent control of this pool was the result of an economic development. (R. 745-758, 1240-1248, 1292-1422) In its former opinion the court found that a pool of sleeping cars available to meet the seasonal demands of all railroads was essential to adequate passenger transportation. It follows, therefrom, that the pool must be in independent hands if the weaker railroads are to be served without discrimination. No sound economic judgment would place an essential supply necessary to all railroads in the control of a few larger competitors. If a supply of any commodity is to be divided equally between A, B, and C, such an equitable division cannot be expected if A—or A and B—control it. It is this obvious economic and business principle rather than "an historical accident" which led to the growth of an independent supplier of sleeping cars to meet seasonal demands.

Nor will the court's economic judgment that the railroads "are the natural and obvious people to do the sleeping car business" stand up under analysis. It is, of course, true, as the court points out that the sleeping-car service is a part of the essential business of carrying passengers and that the railroad locomotive pulls not only the coaches and freight, but also the Pullman cars. But the court overlooks the fact that the sleeping car demand varies widely in different sections of the country from season to season; that in every section the locomotives have more cars to pull at some times than at others. The weaker railroads need a pool of most modern equipment to enable them to compete. The combination of carriers is not the "natural and obvious people" to provide that pool. Indeed it is impossible for them to provide it without outside aid. The elimination of an independent who offers to replace the entire fleet with modern equipment impairs rather than aids the railroads in their function of furnishing sleeping-car service. It is a rule of competition that the more sleeping-cars there are for the railroads to pull the greater will be their competitive opportunity. The business judgment of the court that

a combination of large railroads is the natural person to operate a pool of sleeping-car equipment is contrary to economic fact.

V.

The Court Erred in Neglecting the Criteria Which It Should Have Applied in the Selection of the Successful Bidder.

The criteria by which the court should have judged the several offers are as explicit as the purpose and policy of the Sherman Act. This means that among the several offers that one should have been selected which was best calculated to give effect to the public policy written into the antitrust laws. As former Chief Justice Hughes has said, it is a charter of economic freedom.[8]

It is designed not only to remove the restraints which have prevented competitive expansion in the past but also by affirmative action to create new competitive opportunities for the future. That consideration must be the court's determining principle in its choice among the several offers. This principle is illustrated by a series of recent cases, typical of which are *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, and *B. B. Chemical Co.* v. *Ellis, et al.*, 314 U. S. 495. Applying this principle the following criteria should have been considered by the court:

(a) *The most acceptable offer is the one which most effectively dissipates the consequences of the past monopoly, i.e., the offer which assures the greatest amount of modern equipment and service available to all railroads.*

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[8] *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 359; in *Sugar Institute* v. *United States*, 297 U. S. 553, 600, Mr. Chief Justice Hughes, in speaking for the Court, stated "We have said that the Sherman Anti-trust Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions."

(b) *A second and equally important test is whether the new management is one that proposes to stimulate and expand a nationwide demand for sleeping car travel in competition with air and motor travel.*

(c) *A third test is the competitive record of the new management.*

Too many antitrust decrees in the past have failed of their purpose because the former noncompetitive management continued in control and followed their traditional attitude against competitive expanson.

(d) *A fourth test is which offer provides for the most complete separation of the sleeping car company from any ownership or control, direct or indirect, of Pullman Incorporated, or its affiliates, and from all parties which share with it a community of interest.*

These are the affirmative tests, the essential requisites to enable a court of equity to undo the harm that has been done. Equally important are the negative tests—the tests which safeguard competitive expansion in the sleeping car business for the future.

(f) *The acceptable proposal must preserve the right of every railroad to provide its own equipment, if it finds it economical to do so, without losing the necessary privilege to use a pool of equipment or service for needs which the individual railroad cannot economically provide.*

The right of the individual railroads to provide their own equipment must not be used as a cloak under which a dominant group combines and captures control over the hotel service, thus stifling the development of a unified national service to meet seasonal demands. The temptation on the part of the dominant railroads to keep smaller roads in an inferior competitive position by this means would be very great even if they gave lip service to expansion of the pool. In this case the railroad group making the offer does not

leave its intentions to inference. It boldly commits itself to a program of stifling the development of the future pool of sleeping cars, relying on the curious argument that this is one of the inherent "rights" of rail management with which the court must not interfere. By acquiring control of the hotel service they propose to keep the sleeping car pool at a low level of development and compel railroads unable to supply equipment adequate for their peak demands to use cast-off and inferior equipment.

These are the essential criteria by which an acceptable offer must be judged. In respect to the court's failure to apply such criteria as these to the selection of the successful bidder, we assert that:

1. *The Court erred in not considering which offer would produce (a) the greatest possible supply of sleeping car equipment in the immediate future and (b) stimulate and encourage sleeping car travel, thus dissipating the consequences of the restrictive policies of the former monopoly.*

The Otis & Co. offer proposed to replace the present fleet at a cost of $500,000,000. Appellant contended at the trial that for that reason it was the only proposal which would establish competition in sleeping car manufacture and dissipate the effects of monopoly which was maintained by Pullman Incorporated for so many years.

As has been pointed out, the reestablishment of conditions which lead to the greatest possible competitive expansion of the sleeping car industry is the fundamental purpose of this proceeding. The only offer which will immediately stimulate the maximum competition in the sleeping car industry is one which provides a continuous flow of large orders for thousands of cars instead of the driblets which have starved this industry in the past.

The entire capacity of the industry, which today consists of only three companies in the United States, probably does not exceed four sleeping cars a day (R. 2063, 2064). The Otis & Co. offer proposes to pour into that industry orders

for thousands of cars,—a revolutionary expansion, new in railroad history. (R. 2064-2067) This is an advantage to everyone, and a penalty to no one. There is no hardship to any party which must be weighed against the obvious public interest in favor of the offer of Otis & Co.

Not only would this new demand for sleeping cars stimulate competitive expansion in manufacture; it would also stimulate the aggressive promotion of travel, and encourage new industries which cater to expanding travel. Air and motor travel are on the march. They expect to carry millions of passengers where before the war they carried thousands. That competitive threat requires planning for an aggressive nationwide campaign to sell sleeping car travel. No such aggressive sales promotion of travel has ever been attempted before, in spite of the vast sums invested in railroads. Advertising and sales efforts to promote passenger travel in the past have been pitifully small in comparison with even a single product like Coca-Cola. The new competition, particularly with airplanes, requires a different program for the future.

The growth of the automobile industry was the result of a vast network of independent sales agencies, creating a market for the product, building new enterprise in every city in the land. Firms in the industry were refused funds by bankers who knew that the existing market would not support the investment. But, for some years a price was fixed for a car which was lower than the average cost of production for the year before. Low prices assured profits through exploiting a larger and larger market which the bankers did not know existed. The plan of Otis & Co. for expansion of the pool means that it must follow the same kind of a program. Its efforts cannot be limited to building cars. It must in cooperation with the industry, create the demand to fill those cars. Subsbidiary interests which promote travel—such as cheap automobile transportation to mountain resorts and camps from rail heads—at low cost to take the place of dingy roadside accommoda-

tions, must be encouraged. States will be encouraged to develop their recreational areas to meet the present untouched passenger market. New enterprises may be expected to spread from an expanding travel industry as ripples spread over a pool.

The States of California, Georgia and Colorado, representing the paramount public interest in expanding transportation, intervened in this case to no avail. The court ignored their petitions, though the end purpose of this action should be to serve the very interests that they represent.

Thus it appears that a host of interests, tangible and intangible, are at stake in the court's approval of an offer to purchase. The several offers are to be appraised, not in their formal terms, but by what they give reasonable assurance of bringing about. The public here is no abstraction; it translates itself into such concretions as speedy and comfortable travel, an increasing volume of employment, an expanding sleeping car business, orders for all the supply industries, a great impetus to reconversion. To overlook such values is to forget the very office the anti-trust laws fulfill in our national economy.

2. *In approving the bid of the railroad combine, the court erred in failing to consider the evidence and the facts of which it should have taken judicial notice, which demonstrates (a) the continuous non-competitive policy of the major railroads in the combination with respect to the sleeping car business and (b) the control of the railroad combine is inseparably tied in with the control of the Pullman-Standard Car Manufacturing Company.*

One explanation of the opposition of the major railroads to an expanding sleeping car service is found in the past history of their opposition to improvements in passenger service.

(a) *Anti-competitive policies of the major Western Railroads.*

The traditional opposition of major western roads to a competitive expansion of sleeping car service is demonstrated in memoranda taken from their files and published in hearings of Congressional committees concerned with the so-called Western Agreement. Excerpts from this testimony are set forth in Appendix A hereto. For example, the following letter from the "Western Commissioner", an appointee of the Western roads is revealing:

> "At a meeting of the Western Association of Railway Executives held on October 20th a resolution was adopted to the effect that air conditioning for 1934 would be restricted to observation, lounge and dining cars. Subsequent to that time it developed that one of the roads in Western Territory would find it necessary to air-condition combination sleeping-observation cars inasmuch as full observation cars were not operated on certain of its trains. This action on the part of that carrier again brought the subject of air conditioning before Western Roads for reconsideration and at the meeting of the Association held on Dec. 12, 1933, the action previously taken was rescinded and superseded by a resolution providing that no coaches, chair cars or tourist cars will be air-conditioned during 1934. Western lines are accordingly recanvassing their program for 1934 and will submit to me, prior to the January meeting of the Association, revised programs, in order that competitive situations may be met for the 1934 Summer season without imposing hardships upon any of the carriers." (Letter dated January 2, 1934).

In the same letter, the Western Commissioner (responsible to no public authority) referred to a conference which he had held on February 21, 1933, with the Missouri Pacific and the Missouri Kansas & Texas lines, and stated that the compromise there effected had "avoided the spreading of this competitive feature for 1933 to other lines and obviated the expenditure of a considerable sum of money by Western carriers in meeting competitive situations."

(b) *Anti-Competitive policies of the major Eastern Railroads.*

The following facts, taken from the record in the instant case, are significant:

(1) At the time of the trial, the railroads making the present offer took the position that a pool of sleeping cars was necessary and that the administration of The Pullman Company was fair and equitable.

(2) It affirmatively appears that the Pennsylvania and the New York Central railroads were obtaining secret advantage from The Pullman Company through absorption by Pullman of various categories of train operating expenses, such as car cleaning, which other railroads were compelled to bear. Government Exhibit 525, an historical memorandum taken from the Pullman files, referred to this special arrangement favoring the Pennsylvania and New York Central railroads, as follows:

> "It is very definitely a part of the background of these negotiations, though for manifest reasons not expressed in words in the resultant contract documents, that with increasing degree of profitableness in the Pullman operations on these roads, Pullman would give to the Railroad a concealed participation therein, by Pullman absorbing items of train operating expense that the Railroads had previously borne." (R. 1982)

These practices resulted in transferring costs of operation on the Pennsylvania and the New York Central railroads to the smaller roads served by Pullman.

(3) Further evidence of this policy is set forth in Appendix B hereto. For example, Mr. Crawford, President of The Pullman Company, writes:

> "Mr. Carry reports that there is very definite feeling on the part of the Pennsylvania people that if Pullman consents to installation by the New York Central of non-standard accommodations in the new Century

train, the result will be a 'breakdown' of the present standardized system of Pullman accommodations, and the appearance of a strongly competitive give-away practice in that business. From this I would gather that the Pennsylvania people think Pullman should not encourage the New York Central in their idea of a tailor-made special-type set of Century trains." (R. 1977)

(c) *The activities of the major railroads since the decree in this case was entered show that their former policy of concerted opposition toward competitive expansion of the sleeping car business still prevails.*

The decree was handed down on May 8, 1944. With the approaching end of the war a crisis in sleeping car transportation was imminent. The fleet was obsolete. Practically no new cars were on order. There were no plans to meet the needs of the roads with a seasonal demand. The larger passenger-carrying roads seemed content with their relatively superior position to the smaller roads and did nothing. The smaller roads whose management was connected with the New York banking interests also did nothing.

On May 12, 1945, Pullman Incorporated—authorized by the court to deal with the railroads "and others"—made a proposal to the railroads, the terms of which were roughly the basis of all the offers before the court. This proposal met with what Mr. Crawford, President of Pullman Incorporated, referred to as "prolonged inactivity on the part of the Special Pullman Committees appointed in the three Railroad Conference regions." (R. 2261).

Prior to the intervention of Otis & Co., Mr. Clement, president of the Pennsylvania Railroad Co., had written a letter outlining a plan for dismemberment of the pool and its elimination as a future expanding service. (R. 2278) There were no offers at this time. Therefore, the status quo was being adequately preserved by the device of delay.

After Otis & Co. came forward with its offer, mere delay

no longer would do. The railroads were faced with the necessity of taking positive steps to prevent the pool from expanding. This is dramatically shown by the memorandum of Mr. W. F. Place, vice-president of the New York Central Company. After pointing out the ultimate advantages of dismemberment of the pool, he writes:

> "While this may be the ultimate situation in the future, the railroads appear to be faced with the necessity of immediate action as a result of the petition made by the syndicate of Otis & Co." (R. 2303)

Thus it is clear that it was not the crisis in sleeping car transportation but the crisis caused by the Otis offer which compelled the major railroads to take action for the first time in the two and a half years which had elapsed since the decree.

The policy of the dominant carriers, adhered to throughout the last fifteen years, has been to discourage competitive railway service or equipment that might disturb their dominant position.

CONCLUSION.

The reasons why the decision to sell the sleeping car business to the railroad combination must be reversed may be consolidated into two general arguments, one positive and the other negative.

On the positive side the court was under duty to select the bid which offered the greatest competive expansion of passenger transportation. The public interest in passenger transportation is the very core of this proceeding. This is not a private suit for treble damages. It is an effort on the part of the Government not only to destroy a monopoly but to eliminate the results of that monopoly.

The two principal evils against the public interest in passenger transportation which still survive as a consequence of the former Pullman monopoly are:

(1) Sleeping car equipment is scarce and obsolete. There is not enough to supply all railroads. There is not enough to expand passenger transportation in undeveloped areas.

(2) The first-rate equipment is concentrated in the hands of a few roads. The weaker roads can never catch up. There is no independent agency free from the domination of major railroads which can give the weaker railroads the advantages of large orders and mass production.

There is only one remedy for these two surviving evils created by the former Pullman monopoly. It is to transfer the sleeping car business to a service which is independent and which promises the greatest expansion of sleeping car service available to all.

The plan of the railroad combine approved by the Court is practically a guarantee that these evils will continue, that abundant equipment will not be available for weaker railroads, that the present advantage of the larger railroads will increase.

An aspect of the public interest in passenger transportation is the necessity, under competitive stimulus, for an expansion and modernization of the fleet of sleeping cars. That interest was stifled by the monopoly power of The Pullman Company to stifle new sources of supply and to perpetuate obsolete equipment. There is only one remedy: —to increase the order for cars given to competing manufacturers. The Otis bid promises to flood the manufacturers with orders for seven thousand new cars. By furnishing a service to the competing equipment which the railroads may buy for themselves, it promises also to stimulate railroads' orders.

The bid of the railroad combine is a positive guarantee that orders on a large scale will not be forthcoming. It eliminates any independent source of orders for cars except from the railroads themselves, most of which cannot expand new territory with their own equipment because of fluctuating seasonal demands.

The court below found fault with none of these bids. It did not even suggest that an expansion of the facilities for over-night travel was a factor in appraising the bids. In polite but unspecific language it commended all of them. Its decision must be reversed because it washed its hands of its duty to evaluate them in the light of the purpose which the antitrust laws and this proceeding were designed to accomplish.

On the negative side in accepting the bid of the railroad combine the court has not met the requirements of law.

It cannot be overlooked that the reasons presented by the court are arguments against, rather than in support of, its choice:

1. The railroad combine is the nominee of Pullman Incorporated—that it is named by the party which has been convicted of monopolistic practices;

2. The railroad combine, the bidder most closely connected with the railroad and banking interests shown by the record to have conspired with The Pullman Company, is "the most natural purchaser;" that is, if the malefactor is to give up the business, it must go to its co-conspirators;

3. The control of the combination which comes into possession is to be in the hands of railroads whose present dominant position in the passenger-carrying business would be imperiled by an independent expanding supply of sleeping car equipment available to weaker railroads.

We submit that, under the decisions of this Court, the combination of railroads formed to take over the sleeping car business operated by The Pullman Company constitutes an undue restraint upon interstate commerce and a flagrant violation of the prohibition against monopoly in the first and second sections of the Sherman Act. In this view, the judgment must be reversed and the case remanded with directions as to the criteria which shall guide the court below in passing upon the bids before it. We have set forth

those criteria which we believe are essential to the dissipation of the effects of the former monopoly and which will insure the greatest competitive expansion in the industry. We respectfully urge their adoption by this Court.

Respectfully submitted,

THURMAN ARNOLD,
ARNE C. WIPRUD,
Attorneys for Otis & Co.,
Appellant.

February 17, 1947.

APPENDIX A.

Excerpts from the Testimony of Wendell Berge, Assistant Attorney General of the United States, Before the Sub-Committee on War Mobilization, Committee on Military Affairs of the Senate of the United States (Kilgore Committee), Washington, D. C., February 10, 1944, Pages 1352-1359.

Under the western agreement, certain "changes in practice" could be initiated by a member road only after compliance with the procedure contemplated by the agreement. * * *.

There had been some experimenting with air-conditioning of dining cars on the Santa Fe and the Northwestern railroads in 1931, but the first real air-conditioning west of St. Louis came in the summer of 1932 with the air-conditioning of dining cars on five trains. On December 15, two weeks after the Western Agreement became effective, Mr. Ralph Budd, President of the Chicago, Burlington & Quincy Railroad, wrote to the Western commissioner that he thought that dining and club cars would require air-conditioning on his railroad, and that by arriving at an understanding that air-conditioning should be limited to such equipment the railroads could avoid a repetition of what happened between Chicago and St. Louis where all passenger cars on four trains in each direction had been air-conditioned.

In response to this request to use his efforts to limit air-conditioning to dining and lounge cars, the Western commissioner wrote to Mr. Paul Shoup, Vice Chairman of the Southern Pacific, on January 9, 1933:

> Air conditioning appears to be an innovation which the public is demanding and I presume the Western roads will desire to keep abreast of other territories in its adoption. However, it seems very probable that if something like a uniform policy could be determined upon, a very considerable sum of money might be saved.

To which Mr. Shoup replied on January 14, 1933, stating:

> The roads in California have an understanding among themselves that without previous conference they will not undertake air conditioning of any cars except dining cars. It would appear that this understanding will control for the year 1933 except as it may possibly be affected by the conclusion of President Baldwin of Missouri-Pacific that their line, which has air conditioned its dining cars, would be obliged to air condition lounge cars instead for service between St. Louis and El Paso and St. Louis and South Texas.
>
> It is unquestionably desirable that the Western lines should air condition their trains to the same extent that their connections in the East have done but in view of the certainty of light passenger traffic during the coming summer, which arises from causes that cannot be substantially combatted by the improved service of air-conditioned trains, it would seem to be best to postpone for another year any extension of air conditioning except as some lines may find it necessary to air condition more of their dining cars.

* * * * * * * * * * *

At a meeting of the Executive Committee of the Western Association of Railway Executives on February 3, 1933, the subject of air conditioning was further discussed. Following this meeting, Mr. E. Flynn, Vice-President of the Chicago, Burlington & Quincy, hereafter referred to as the Burlington, wrote the Western Commissioner on February 6, stating that in view of the objections expressed by practically all of the other roads, the Burlington had decided to forego its plans to install air conditioning in the dining and lounge cars of the Burlington's "Aristocrat," operating between Chicago and Denver. This letter continued:

> There is much that can be said in support of our proposal, and it is with reluctance that we defer it. We are all frequently seeing and reading that the railroads must improve their methods and service if they are to regain, or even hold their traffic as against competing forms of transportation.

* * * * * * * * * * *

On the same day, February 6, 1933, the Missouri Pacific advised the Western Commissioner of its intention to air condition certain dining and lounge cars in order to meet competition, and thereafter notified other interested railroads.

On February 7, the Western Commissioner notified the Missouri Pacific that its proposal would be considered in connection with the protest of other railroads.

On February 13, the St. Louis & San Francisco, hereafter referred to as the Frisco, advised the Commissioner of its air conditioning plans, stating "that this does not violate the Agreement made between the executives as to air cooling certain equipment."

However, in view of the protests against the program of the Missouri Pacific, the Commissioner advised the Frisco to hold its plans in abeyance, and the Frisco acquiesced.

On February 15, the Western Commissioner had also asked the Missouri Pacific to withhold action on its air conditioning, which that road agreed to do for two weeks.

On February 21, the Western Commissioner held a meeting with representatives of the Missouri Pacific, the Frisco, the Missouri, Kansas & Texas, the latter of which was vigorously protesting and was worried about its own program; and a week later he rendered a formal decision, effective for the year 1933, carrying out a compromise reached at the February 21st meeting.

The decision provided for a reduced program of air conditioning. The Western Commissioner's report was distributed to all parties to the Western Agreement.

Subsequently, the Wabash advised the Commissioner that it assumed that it had the right to expand its air conditioning service, on the ground that it was in competition with a number of the air-conditioned services permitted by the decision, but the Commissioner took a different view, stating:

> Not contemplated that air conditioning would extend beyond limits outlined in my report. Were you to install air-conditioned diners in conjunction with the Union Pacific service now, it would jeopardize present situation and very likely result in other lines following suit. Union Pacific agreed would not install any new service as result of this agreement. I hope, therefore, you can hold in abeyance for this year any plans you have in this connection.

The Receiver of the Wabash refused to accede to this request, and proceeded with some air conditioning.

* * * * * * * * * * * *

The Western Commissioner reported periodically on these matters to the Committee of Directors. In a letter of January 2, 1934, he advised them of the activities of the railroads against the spread of air conditioning in 1934, stating:

> At a meeting of the Western Association of Railway Executives held on October 20, a resolution was adopted to the effect that air conditioning for 1934 would be restricted to observation, lounge and dining cars. Subsequent to that time it developed that one of the roads in Western Territory would find it necessary to air-condition combination sleeping-observation cars, inasmuch as full observation cars were not operated on certain of its trains. This action on the part of that carrier again brought the subject of air conditioning before Western Roads for reconsideration and at the meeting of the association held on December 12, 1933, the action previously taken was rescinded and superseded by a resolution providing that no coaches, chair cars, or tourist cars will be air-conditioned during 1934. Western lines are accordingly recanvassing their program for 1934 and will submit to me, prior to the January meeting of the association, revised programs in order that competitive situations may be met for the 1934 summer season without imposing hardships upon any of the carriers.

In the same letter, the Western Commissioner referred to the conference on February 21, 1933, which he had held

with the Missouri Pacific and the Missouri, Kansas & Texas lines, and stated that the compromise there effected had "avoided the spreading of this competitive feature for 1933 to other lines and obviated the expenditure of a considerable sum of money by western carriers in meeting competitive situations."

On February 1, 1934, the western commissioner reported by letter to the committee of directors on the January 5, 1934 meeting of the Western Association of Railway Executives, at which the railroads' 1934 programs had been presented, stating that about 300 cars would be air conditioned and that "as a general practice air conditioning will not be extended to sleeping-car equipment this year."

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In April 1934, the commissioner ruled that with the exception of cars chartered on a pier diem basis, no railroad could operate any air conditioned equipment unless it was cleared by the Commissioner.

On May 4, 1934, the Southern Pacific complained to the western commissioner that the Rock Island was making ready to run an air-conditioned cafe-sleeping car from Dallas to Houston after it had arrived from Minneapolis, and that it was afraid the effect would be to induce other roads to leave air-conditioning equipment functioning between Fort Worth and Houston instead of disconnecting it upon the arrival of the cars at Fort Worth.

The western commissioner intervened in this situation, but while he did not forbid the Rock Island to continue the protested action, in part because of the cooling of a car on the Southern Pacific's "Sunbeam" he did advise the Southern Pacific, on May 19, that "other Dallas-Houston lines will not enlarge their program."

• • • • • • • • • • • •

In a special situation involving a single car, the Western Association of Railway Executives, on May 11, 1934, granted the Union Pacific an exception from what they

regarded as the agreement resulting from the submission of the 1934 programs. The spirit of the railroads in strictly adhering to their plan to avoid competition is indicated by the resolution adopted:

> Resolved, that in view of the written commitment made by the Union Pacific prior to the adoption of air-conditioning program for Western Railroads for the year 1934, they be relieved from observance of the agreement in the specific instance cited, with the understanding that such action shall not establish a precedent to be followed in the future.

On January 6, 1934, the Illinois Central, the Wabash, and the Chicago and Eastern-Illinois protested to the Western Commissioner against the Chicago & Alton's plan to air-condition sleeping cars between Chicago and St. Louis; and on January 22, the three protesting roads sent the Commissioner a written statement supporting the proposal that they should not be compelled by the Alton's competition to install air conditioning. On March 21, 1934, the Commissioner decided against the Alton; he ruled that it could move to St. Louis the air-conditioned cars delivered to it by the Baltimore & Ohio, but without putting the air-conditioning machinery into operation. On March 26 the Alton protested the ruling, and on April 4, the Commissioner announced his refusal to change his previous decision. On June 23, the Alton advised the Commissioner that it would keep the air conditioning in operation on the Baltimore & Ohio trains.

After 1934, the restrictions on the installation of air-conditioned equipment were relaxed. However, until March 29, 1937, the railroads were required to give 60 days' notice to the Chairman of the Western Association of Railway Executives before placing air-conditioned equipment in operation.

* * * * * * * * * * * *

In response to a resolution adopted by the Western Association of Railway Executives on October 4, 1934, the

Western Commissioner, acting as Chairman of the Western Association of Railway Executives, appointed a committee on October 24, 1934 to discuss with the Pullman Company the creation of a pool of air-conditioned Pullman equipment. The substance of the terms and conditions agreed upon by the railroads as the basis for the operation of the Pullman pool was reduced to writing by the Committee on November 30, 1934. Among other terms, it was proposed that any air-conditioned pool cars, not required by the pool members to which they were assigned, might be utilized by the Pullman Company on other Western lines which were members of the pool, but not on the lines of non-members in the West, although the cars might be used in the East or the South. And carrying further the same objective, it was proposed that air-conditioned cars assigned to Eastern roads should not be used by the Pullman Company on the lines of non-member Western roads, except where the Eastern cars were in the West to replace Western cars which had gone East.

It was not difficult for the Western Association of Railway Executives to persuade the Pullman Company to cooperate in controlling the air-conditioning of Pullman cars. The Pullman Company was prepared to make air-conditioned equipment available to the railroads with which it had contracts, provided the railroads entered into supplementary agreements for the quick amortization of Pullman's investment in air-conditioning Pullman's equipment. The ability of the Pullman Company through its monopolistic power to carry out this policy of shifting most of the cost of air-conditioning Pullman equipment in large measure to the contracting railroads undoubtedly had the effect of deterring the railroads from asking for as much air-conditioned equipment as they would otherwise have used.

Statement of Senator Wheeler, Chairman, before the Committee on Interstate Commerce, United States Senate, 78th Cong., 1st Sess., on May 25, 1943, at p. 239 of hearings on S. 942, Regulation of Rate Bureaus.

> "I must confess that this agreement was a shock to me because it evidences quite clearly the control the powerful nonrailroad interests in the East have over transportation rates in the West. We have heard a great deal in recent months about discrimination against the West and the South. It seems to me this agreement, which has been in existence since 1932, may well be the instrument of control by which these discriminations have been perpetuated."

Statement of W. A. Harriman before the Committee on Interstate Commerce, United States Senate, 78th Cong., 1st Sess., on June 23, 1943, at p. 975, of hearings on S. 942, Regulation of Rates.

> "Looking back over the operation of the Commissioner plan, I am satisfied that it has served a valuable part in preparing the western railroads for their necessary and efficient part in the present war. The plan has facilitated the impartial consideration of many proposals, the protection of the railroads from impositions of unscrupulous or grasping shippers, from the excesses of zeal or inexperience of their own traffic employees. If this is a conspiracy, then the railroads of this country need bigger and better conspiracies."

APPENDIX B.

The Evidence Introduced by the Government in the Pullman Case Reveals the Following:

1. It appears that down through the years Pullman has favored P. R. R. and N. Y. C. over smaller roads by giving the former a larger porportionate share in Pullman revenue and by absorbing for P. R. R. and N. Y. C. various categories of train-operating expenses, such as car cleaning, which Pullman required all other railroads to absorb. As stated in Ex. G. 525, "It is very definitely a part of the background of these negotiations, though for manifest reasons not expressed in words in the resultant contract documents that with increasing degree of profitableness in the Pullman operations on these roads, Pullman would give to the railroad a concealed participation therein, by Pullman absorbing items of train-operating expenses that the railroads had previously borne" and which all other railroads were still compelled to bear. (R. 1982) In view of Pullman's practice of averaging operating expenses over all cars operated, the practice just described resulted in transferring costs of operation on P. R. R. and N. Y. C. to the smaller roads in the Pullman system.

Vice-President Deasy of the P. R. R. testified for Pullman that he believed Pullman relationships to P. R. R. to have been fair and equitable.

II. On the question of interlocking directors, Pullman down through the years has been solicitous to maintain a strong position on the board of P. R. R. and N. Y. C.

It appears that this consideration alone, prompted Pullman in 1924 to reorganize the manufacturing department into a separate subsidiary. Pullman wrote to Vanderbilt (Ex. G. 501) "In regard to the question of directorship which you raised, the New York Central is really the only point where there would be any disadvantage because of yourself and Mr. Baker's being on our board and I believe

a way will be found; in fact, a way must be found, as it would be very unfortunate for the Pullman Company if you and Mr. Baker were to desert it. While the Clayton Act would suffice as an excuse, it would not restore the sentiment and the vital influence that emanates from the directory." (R. 1979)

Pullman wired Baker (Ex. G. 504) "Understand N. Y. C. are buying cars. They have not asked Pullman Company for figures. STOP. If you have chance to say good word for us without least embarrassment to yourself will appreciate it." (R. 1980)

Whenever Pullman encountered contract difficulties with P. R. R. or N. Y. C. negotiators, Crawford customarily referred deadlocks to Whitney, Mellon, and McLennan.

Whenever N. Y. C. and P. R. R. operating people were intransigent in negotiations Crawford would appeal to Whitney or Mellon. See Ex. G. 106, Crawford's letter to Whitney. (R. 1953)

In Ex. G. 146 Crawford wires McLennan, "George tells me that the meeting today was harmonious and reflected very substantial progress toward working understanding between the two interests concerned STOP • • • He suggested that in order to close these points out without a lot of argument through committees the three presidents involved might very well meet and work out agreement on a list of points in contention which he is preparing and will send on to me for study in advance of meeting. • • • " (R. 1956)

In Ex. G. 110, Mellon, responding to numerous letters from Crawford soliciting his assistance, reports, "I have had a most satisfactory conversation with Mr. Hankins and Mr. Scheaffer in the Pennsylvania Railroad offices in Philadelphia." (R. 1955)

In Ex. G. 115 Crawford writes, "Mr. R. K. Mellon called me on the 'phone this morning to say that he has had another talk with Mr. Clements about the Pennsylvania operating contract matter." (R. 1956)

Pullman also had occasion to rely on Whitney and Mellon to prevent P. R. R. or N. Y. C. buying Budd cars. In Ex. G 416 Sturgis wires Crawford, "With no desire on our part to mar your well-deserved holiday, Mr. Whitney and I think you should know that we are very much worried about the fact that Williamson seems completely sold on Budd-built, stainless steel cars for a new Century * * * Mr. Whitney is leaving August 3rd for a holiday. Is there any chance we could get this matter threshed out before then?" (R. 1975)

III. On the general proposition that P. P. R. and N. Y. C. were really co-conspirators with Pullman in retarding the introduction of light-weight equipment generally, and in restraining the introduction of Budd equipment entirely, the Government introduced much evidence showing that P. R. R. and N. Y. C. mutually agreed to introduce as little lightweight equipment as possible, and precisely the same amount, and at precisely the same time.

Crawford writes Ex. G. 418, "Mr. Carry reports that there is very definite feeling on the part of the Pennsylvania people that if Pullman consents to installation by the New York Central of non-standard accommodations in the new Century train, the result will be a 'breakdown' of the present standardized system of Pullman accommodations, and the appearance of a strongly competitive give-away practice in that business. From this I would gather that the Pennsylvania people think Pullman should not encourage the New York Central in their idea of tailor-made, special-type set of Century trains." (R. 1977)

In Ex. G. 419 Carry writes, "Messrs. Deasy and Hankins were in town yesterday for Marian Newcomet's funeral and I had quite a chat with both of them. I saw Hankins before I did Deasy and he seemed to be amused at the jam they have gotten into as a result of putting the new cars into secondary services where they do not intend to keep them. Apparently at a recent staff meeting this subject was fully

aired and Mr. Clement instructed Mr. Franklin to get out of any agreement or understanding he had with the New York Central. As near as I can tell from their conversation, they will refrain from putting the new equipment on 'Broadway' until the New York Central is ready to start the new 'Century,' but they intend to go ahead with the 'Liberty' and the 'American' immediately." (R. 1977)

In Ex. G. 422 Holden writes to Crawford, "I talked to Mr. Williamson of the New York Central this afternoon concerning the 50 new light weight sleeping cars that his people have asked us to provide for their services and find that he seems to have considerable question in his mind as to the economic justification of going ahead with additional cars at this time. He stated that the only reason his people made the request on us was because he understood we were definitely going ahead with a somewhat similar program for the Pennsylvania but that his opinion was the proper thing to do is to hold up both programs.

"Mr. Williamson also stated that the joint committee of officers and directors recently formed with the Pennsylvania, including among others, himself, Mr. Clement, Mr. Whitney and Mr. Gates were to have a meeting on either October 4th or 5th to discuss various questions related to competitive waste between the two roads and that he would bring this question of new equipment up before the meeting with definite recommendation that no additional cars be requested from the Pullman Company over and above 52 cars that have already been placed on each Road. He asked that I come back to see him after this meeting takes place to discuss the matter further." (R. 1978, 1979)

The result was that as of March 31, 1941 (Stipulation, page 117) P. R. R. and N. Y. C. each had precisely 142 light-weight cars. (R. 1414)

APPENDIX C.

The Interlocking Relationships of the Directors of Pullman Incorporated as Shown of Record at the Hearing on Petition for Approval of Offer to Purchase The Pullman Company.[1]

Director George Whitney is president and director of J. P. Morgan & Co., Inc. He is also a director of the New York Central, West Shore, and Pittsburgh & Lake Erie railroads, and a member of the executive committee and director of the Cleveland, Cincinnati, Chicago & St. Louis and the New Haven and Harlem railroads. Gustav Metzman, president and director of the New York Central Railroad Company (and president and/or director of numerous other railroads) and a director of J. P. Morgan & Co., Inc., testified for the railroad proposal. (R. 2219-2230) W. F. Place, vice-president of the New York Central Railroad Company, prepared the memorandum of the plan that was originally presented by Mr. Metzman to the railroads. (R. 2303) This in substance is the offer filed by a group of railroads with this court. Other directors of J. P. Morgan & Co., Inc., are directors of railroads, as follows: Thomas W. Lamont, chairman of the board, is a director of the Atchison, Topeka & Santa Fe Railway Company, and Arthur M. Anderson is a director of the Northern Pacific Railway Company. All of the above railroads are directly or indirectly members of the railroad purchasing group.

Director Harold S. Vanderbilt is a director of the New York Central Railroad Co., and 29 railroad affiliates. Mr. Vanderbilt is also a director of the First National Bank of the City of New York. On that board sit Jackson E. Reynolds and Myron C. Taylor, directors of the New York Central Railroad Co., John R. Morron, director of the Baltimore & Ohio Railroad Co., Landon K. Thorne, director of

[1] The District Court ruled that it would take judicial notice of Poor's Register of Directors and Executives. (R. 2217, 2229.)

the Southern Pacific Co., and Alexander C. Nagle, director of the Great Northern Railway Co. All of the above railroads are members of the railroad purchasing group.

Director Richard K. Mellon is a director of the Pennsylvania Railroad, which is a member of the railroad purchasing group. He is also president and director of the Mellon National Bank of Pittsburgh and a director of the Union Trust Company of Pittsburgh. On the board of the Mellon National Bank sits L. N. Murray, director of the New York Central Railroad Co. Mr. Mellon is also a director of a number of railway supply companies, including the Westinghouse Air Brake Co. and the Union Switch and Signal Company. He is also a director of the Aluminum Company of America and the Carborundum Company. Henry A. Phillips, vice president, secretary and a director of Pittsburgh Equitable Meter Company (name changed to Rockwell Manufacturing Co.), is a director of the Carborundum Co. and of the Mellon National Bank.

Director J. Frank Drake is the president and director of the Gulf Oil Co., on the board of which sit Richard K. Mellon and William L. Mellon, as does Alan M. Scaife, director of Pullman Incorporated. Mr. Drake is also a vice president and director of the Rockwell Manufacturing Co. (formerly Pittsburgh Equitable Meter Co.). Mr. Drake is also a director of the Chase National Bank of New York, on the board of which sit F. H. Brownell, director of the Northern Pacific Railway Co., Newcomb Carlton, director of the Union Pacific Railroad Co., Bertram Cutler, director of the New York Central Railroad Co., Austin S. Iglehart, director of the Chicago & Eastern Illinois Railroad Co., Jeremiah Milbank, director of the Southern Railway Co., and A. W. Robertson, director of the Westinghouse Electric & Manufacturing Co. All of the above railroads are directly or indirectly members of the purchasing group.

Director John R. Morron is a director of the Baltimore and Ohio Railroad Co., a member of the railroad purchasing

group, as well as a director of the First National Bank of the City of New York, which bank, as noted, has a number of directors who are also directors of numerous railroads. Mr. Morron is also a director of the Alton Railroad Company.

Director Alan M. Scaife is vice president and member of the executive committee and director of the Gulf Oil Company. He is also a director of the Mellon National Bank and other institutions, including Pittsburgh Coal Co. and the Air Reduction Co. On the board of the Air Reduction Co. sits Frederick B. Adams, a director of the Atlantic Coast Line Railroad Company, Guy Cary and Knight Woolley, directors of the Southern Railway Co., and Clarence Francis, a director of the Northern Pacific Railway Co.

Director Alfred P. Sloan, Jr., is chairman and director of the General Motors Corporation and a director of J. P. Morgan & Co., Inc., George Whitney, president and director of J. P. Morgan & Co., is a director of General Motors Corp., as are directors Henry B. duPont, Henry F. duPont, Lammot duPont, of E. I. duPont de Nemours & Co. Mr. Sloan is a director of the duPont Co. Pierre S. duPont is a director of the Pennsylvania Railroad Company. Mr. Sloan is also director of Kennecott Copper Co., as is George Whitney and E. Tappan Stannard, directors of J. P. Morgan & Co.

Director Sewell L. Avery is chairman and director of Montgomery Ward & Co., Inc., on the board of which sit George Whitney, David A. Crawford, president and director of Pullman Incorporated, and Charles F. Glore, of Glore, Forgan and Co., investment bankers. Mr. Avery is also a director of Armour & Co., upon the board of which sit Elisha Walker, partner of Kuhn, Loeb & Co. and David A. Crawford. Mr. Avery is also a director of the U. S. Steel Corporation, on the board of which sit Thomas L.

Lamont and Arthur M. Anderson of J. P. Morgan & Co., and Robert C. Stanley, a director of the Canadian Pacific Railway Co.

Director James F. Bell is chairman and director of General Mills, Inc., upon the board of which sits Henry F. Sturgis, a director of Pullman Incorporated and vice president of the First National Bank of the City of New York. Mr. Bell is also a director of American Telephone and Telegraph Company, on the board of which sit Myron C. Taylor, Samuel A. Welldon and Walter S. Gifford, directors of the First National Bank of the City of New York (Samuel A. Welldon is also a director of the Northern Pacific Railway Co., a member of the purchasing group), Charles P. Cooper and John W. Davis, directors of Guaranty Trust Co. of New York, David A. Crawford, president and director of Pullman Incorporated, and Tom K. Smith, director of Ann Arbor Railroad, Lake Erie & Fort Wayne Railroad, Manistique & Lake Superior Railroad, Menominee & St. Paul Ry., New Jersey, Indiana & Illinois Railroad, Toledo Central Station Railway, and the Wabash Railroad; Lewis H. Brown, director of the Pacific Southwestern Railroad, Charles Francis Adams, director of the New York, New Haven and Hartford Railroad, and the Boston and Albany Railroad.

Director Arthur O. Choate is a director of the American Can Co., upon the board of which sits M. W. Kellogg, a director of the Guaranty Trust Co. of New York and of Pullman Incorporated. Mr. Choate is also a director of J. I. Case Co., upon the board of which sits Mr. Henry S. Sturgis, director of Pullman Incorporated and vice president of the First National Bank of the City of New York.

Director Henry S. Sturgis is vice president of the First National Bank of the City of New York and a member of the finance committee and director of the Erie Railroad. Mr. Sturgis is also a director of the West Virginia Coal

and Coke Corp., upon the board of which sits David A. Crawford, president and director of Pullman Incorporated.

Director M. W. Kellogg is president and director of M. W. Kellogg Co. (recently acquired by Pullman), and is also a director of the Guaranty Trust Co. of New York and of the American Can Co. On the board of the latter company sits William Ewing, a director of Morgan, Stanley & Co., J. Luther Cleveland, a director of Morgan, Stanley Co. of New York and the Atchison, Topeka and Santa Fe Railway Co., is a director of the M. W. Kellogg Co. Directors of the Guaranty Trust Co. of New York are directors of railroads as follows: Eugene W. Stetson is chairman of the executive committee and director of the Illinois Central Railroad Company and director of the Yazoo & Mississippi Valley Railroad. Fanning W. Charske is chairman of the executive committee and director of the Union Pacific Railroad Co., Oregon Short Line Railroad Co., Oregon-Washington Railroad & Navigation Co., and the Los Angeles & Salt Lake Railroad Co. He is also a director of the Railway Express Agency, Inc. Arthur C. Dorrance is a director of the Pennsylvania Railroad. Walter S. Franklin is vice president and director of the Pennsylvania Railroad, director of New York Connecting Railroad, director of Wabash Railroad, director of Norfolk & Western Railway, vice president and director of Pittsburgh, Cincinnati, Chicago & St. Louis Railroad, vice president and director of Northern Central Railway, vice president and director of Philadelphia, Baltimore & Washington Railroad, director of Pittsburgh, Baltimore & Washington Railroad, director of Pittsburgh, Youngstown & Ashtabula Railway, director of Pennsylvania, Ohio & Detroit Railroad, director of Western New York & Pennsylvania Railway, director of Lehigh & Hudson River Railway, and director of Pennsylvania Greyhound Lines Inc. He is also a director of Railway Express Agency, Inc. John A. Hartford is director of New York, New Haven and Hartford Railroad and Long Island Rail-

road. George E. Roosevelt is a director of Union Pacific Railroad, of Oregon-Washington Railroad & Navigation Co., of Oregon Short Line Railroad and of the Los Angeles & Salt Lake Railroad.

It must be abundantly clear that these 12 directors are not free to select a purchaser for The Pullman Company other than a purchaser determined for them by the institutions which they represent. Thus they have no choice but to select a purchaser who would be controlled by the same interests which control the Pullman Standard Car Manufacturing Co. The remaining 3 directors, namely, David A. Crawford, John F. Lane and L. S. Taylor, are paid officers of Pullman Incorporated and The Pullman Company; thus their concurrence in the action of the 12 is assured. It should be added that David A. Crawford is also a director of the Continental Illinois National Bank and Trust Company, on the board of which sit W. J. Cummings, receiver of the Chicago, Milwaukee, St. Paul & Pacific Railway Company and of the Chicago Railways Company, James R. Levell, director of the Chicago & Eastern Illinois Railroad Company, A. Sprague, director of the Baltimore & Ohio Railroad Company, and R. L. Williams, director of the Chicago and Northwestern Railroad Company.